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No. 415

In The

Supreme Court of the United States

OCTOBER TERM, ~~1947~~ 1948

JOE J. FISHER,

Petitioner

v.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS,

Respondent

Petition for Writ of Certiorari and Supporting Brief

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SUBJECT INDEX

	Page
This Index	i
Index of Authorities	
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	1
Basis for and Statement of the Jurisdiction of the Supreme Court	2
Questions Presented	6
Reasons for Allowance of the Writ	7
Prayer	14
Signatures of Counsel	14
Supporting Brief on Petition for Writ of Certiorari	15
Preliminary Statement	15
Points of Error	19
Argument and Authorities Under Point One (Relating to the lack of review of the facts herein by the Supreme Court of Texas)	20
Argument and Authorities Under Point Two	26

Page

Point (2a), Relating to the fact that Petitioner actually was held in contempt because he excepted to the language and conduct of the trial judge 26

Point (2b), Relating to the fact that the order or instruction of the trial judge was too vague and unintelligible to be the basis for any contempt. 29

Point (2c), Relating to the fact that the trial judge was an active disputant in the controversy involved. 34

Conclusion 37

Prayer 39

Signatures of Counsel 39

INDEX OF AUTHORITIES

American Law Reports, volume 154, p. 1227 22

American Surety Co. v. Baldwin, 287 U.S. 156, 53 S. Ct. 98 23

Baldwin v. Iowa State Traveling Men's Assn., 283 U.S. 522, 51 S. Ct. 517 23

INDEX OF AUTHORITIES—(Cont'd)

	Page
Buck v. Bell, 143 Va. 310, 130 S.E. 516, 274 U.S. 200, 47 S. Ct. 584	36
Church, Habeas Corpus, section 152	21
Cooke v. United States, 267 U.S. 517, 45 S. Ct. 390	13, 36
Corpus Juris Secundum, volume 17, p. 16	33
Craig v. Harney, 331 U.S. 367, 67 S. Ct. 1249	12, 26
District of Columbia v. Clawans, 300 U.S. 617, 57 S. Ct. 660	23
Ex parte Crenshaw, 259 S.W. 587, 31 A.L.R. 1131	27
Ex parte Fisher, 206 S.W.(2d) 1000	15
Geo. Moore Ice Cream Co. v. Rose, 289 U.S. 373, 53 S. Ct. 620	23
Grannis v. Ordean, 234 U.S. 385, 34 S. Ct. 799	5
Herring v. Houston Nat'l Exchange Bank, 113 Tex. 337, 255 S.W. 1097	27
N. L. R. B. v. Bell Oil & Gas Co., 98 F.(2d) 406	13, 29

Page

Postal Mutual Indemnity Co. v. Ellis, 169 S.W. (2d) 482 35

Revised Civil Statutes of Texas (1925), Article 8306(12) 16

1911 1

1737 3

Southland Greyhound Lines, Inc. v. Matthews, 74 S.W.(2d) 713 28

Terminal R. Assn. of St. Louis v. U.S., 266 U.S. 17, 45 S. Ct. 5 ..... 21, 33

Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437 ..... 11, 36

Union Drainage Dist. v. Smith, 233 Ill. 417, 84 N.E. 376 ..... 11, 36

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U.S. 510, 32 S. Ct. 535 23

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R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS,

Respondent

Petition for Writ of Certiorari

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

Petitioner is an attorney at law who was adjudged in contempt by a district judge in Texas while he was arguing a civil suit on behalf of an injured negro. The punishment was the maximum permitted under Texas Law (Article 1911, Revised Civil Statutes of Texas, 1925), to-wit, a fine of $100.00 and imprisonment for three days. The words uttered

by Petitioner which allegedly constituted the contempt may be found both on pages 14-15 and 25-26 of the Transcript of Record herein. The parties are in agreement as to the words employed by Petitioner and as to the circumstances under which they were spoken.

Petitioner duly applied for a writ of habeas corpus from the Supreme Court of Texas. In a divided decision, that Court refused the writ. The opinion of the Texas Supreme Court may be found on pages 33 *et seq.*, of the Transcript of Record herein, with the dissenting opinion being on pages 40, *et seq.* The opinion of the Supreme Court of Texas is highly ambiguous, and is susceptible of at least two interpretations. On the one hand, the opinion appears to say that the Court will not review the language and acts of Petitioner to ascertain whether, as a matter of law, such language and acts constituted a contempt. The opinion of the Court was so construed in the dissenting opinion in this case (R. 49). On the other hand, there are indications in the opinion that the Court reviewed the facts, but held that such facts evidenced a contempt. Regardless of the interpretation which is placed upon the opinion, Petitioner contends that he has been deprived of due process of law in the courts of Texas for reasons which are amplified below.

Basis for and Statement of the Jurisdiction of the Supreme Court

The Supreme Court has jurisdiction to grant a

writ of certiorari in this cause under the provisions of Section 237 of the Judicial Code, as amended, Title 28, Section 344(b), U.S.C.A., by virtue of Petitioner's claim that in the Texas courts he was deprived of due process of law, and of the rights and privileges attendant to due process, in contravention of the Fourteenth Amendment to the Constitution of the United States.

This case differs from the usual case brought before this Honorable Court on certiorari in that the only forum in which Petitioner was afforded any character of trial below—the Supreme Court of Texas—was also the court of last resort in that State. Consequently, there is not present herein the usual situation of a trial in a state court, followed by appellate review in a state court. The district court of Texas summarily adjudged Petitioner to be in contempt without any character of trial, and, indeed, that court refused to permit Petitioner even to inquire how or wherein he was thought to be guilty of contempt (R. 14-15, 25-26). In accordance with the laws of Texas (Article 1737, Revised Civil Statutes of Texas, 1925), Petitioner utilized the only method available for review of a contempt judgment of this character and instituted an original action for habeas corpus in the Supreme Court of Texas. Hence, in complying with the requirements of Rules 12(1) and 38(2) of this Honorable Court, Petitioner cannot make a separate statement of how the federal questions were presented and dealt with by the trial court and by the appellate court of the State, and Petitioner can only set forth the manner in

which such questions were treated by the Supreme Court of Texas.

In his Supplemental Application for Writ of Habeas Corpus, Petitioner pleaded that the action of the district judge in committing him for contempt under the undisputed facts in the case constituted a deprivation of liberty without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States (R. 6). In its opinion, the Supreme Court of Texas did not specifically allude to the Federal Constitution, but it prefaced its discussion with the statement that:

> "The inquiry before us is whether or not a citizen is restricted of his liberty without due process of law." (R. 35).

Hence, it affirmatively appears that the Supreme Court of Texas expressly based its opinion herein upon the constitutional question of due process.

Subsequent to the rendition of judgment by the Supreme Court of Texas, Petitioner filed a motion for rehearing in which he contended that the opinion of the Court denied to him the due process of law guaranteed by the Fourteenth Amendment, either because—under one interpretation of the opinion—the refusal of the Texas court to review the facts prevented him from obtaining any character of an impartial trial upon the merits of his case, or—under the other interpretation of the opinion—any judgment of contempt based upon the undisputed facts herein also is violative of due process (R. 67-

69). In a split decision, and without opinion, the Supreme Court of Texas overruled this motion.

Petitioner recognizes the general rule established by the decisions of this Honorable Court to the effect that the Court normally will not take cognizance of federal questions presented in a motion for rehearing. In the case at bar, however, the federal question was pleaded by Petitioner at the inception of the suit and was referred to by the Supreme Court of Texas as constituting the "inquiry" before it. If the additional assignments of federal questions in the motion for rehearing are in any way necessary to confer jurisdiction upon this Honorable Court, Petitioner respectfully suggests that under the holding in *Grannis* v. *Ordean*, 234 U. S. 385, 34 S. Ct. 799, 58 L. Ed. 1363, the general rule referred to above does not obtain in a situation such as this in which the deprivation of due process results from, and exists by virtue of, the opinion and judgment of the court in which the motion for rehearing was filed. As will hereinafter be more fully shown, it was not until the opinion of the Supreme Court of Texas was handed down that Petitioner was apprised of the fact that no court in Texas would—under the interpretation of the majority opinion which is contained in the dissenting opinion—enter upon an impartial examination of the facts in his case, and it was not until the time for filing a motion for rehearing that Petitioner had reason to complain of the denial of due process which resulted from such refusal to review.

Petitioner's motion for rehearing was overruled by the Supreme Court of Texas on January 21, 1948, and this petition is being printed and mailed to reach the Clerk of this Honorable Court prior to the expiration of three months from such date.

Questions Presented

The questions presented herein may be stated in two categories, dependent upon the interpretation which is placed upon the opinion of the Supreme Court of Texas.

(a)

If the dissenting opinion is correct in stating that the Supreme Court of Texas refused to enter upon any examination of the undisputed facts to ascertain whether such facts, as a matter of law, constituted contempt, then:

> Is an attorney deprived of due process of law and of the rights and privileges embraced in the concept of due process when he is summarily adjudged in contempt of court for having uttered certain words, when he is denied an opportunity even to inquire how or wherein it is thought that spch words are contemptuous, and when the only court in his jurisdiction to which he can appeal from the contempt judgment refuses to scrutinize his words to see if, as a matter of law, they could in any way serve as a basis for such a judgment?

(b)

If the Supreme Court of Texas examined the facts in the case and held that such facts evidenced a contempt, then:

Is an attorney deprived of due process of law and of the rights and privileges embraced in the concept of due process when he is summarily adjudged in contempt of court for having uttered certain words, and

(1) When the undisputed facts reveal that the words for which he was adjudged in contempt were words necessary for taking and preserving an exception to the conduct and language of the trial court?

(2) When the words allegedly were uttered in violation of an instruction of the trial court, but when the undisputed facts reveal that any such instruction was so vague and unintelligible as to make impossible an understanding of its nature or scope?

(3) When the judge who rendered the contempt judgment had, under the undisputed facts, cast aside his role of an impartial arbiter and had created and provoked the situation in which the words were spoken?

Reasons for Allowance of the Writ

The principal reason why this Honorable Court

should grant a writ of certiorari in this case is well stated in the opening paragraph of the dissenting opinion in the Texas Supreme Court (R. 40):

> "A question highly important to the bench, bar, and litigants is involved in this case. If, based upon the facts of this case, the majority opinion becomes the settled law of this State, then a trial judge by the exercise of arbitrary power could prevent an attorney from representing his client in a case on trial according to the duty which he owes his client."

The majority opinion of the Supreme Court of Texas appears to hold that a trial judge can in a direct contempt proceeding, fine and imprison an attorney, or any other person appearing before the court, for a good reason, for a bad reason, or for no reason, and that his action in so doing is not subject to review by any court in Texas so long as he had jurisdiction over the person of the alleged offender (a jurisdiction which is always present in true direct contempt situations) and so long as he had jurisdiction over the subject matter of the case before him (a jurisdiction which also seemingly would be ever present in a direct contempt situation). As is stated in the dissenting opinion, the Supreme Court of Texas appeared to hold:

> "that the relator is not entitled to obtain any relief in this Court under habeas corpus proceedings regardless of the lack of any probative evidence in the record showing that he was guilty of any contempt." (R. 48).

The certain and inevitable effect of the decision of the Supreme Court is to clothe each trial judge in Texas with the tyrannical powers of a Lord Jeffreys insofar as contempts are concerned. Under the decision of the Texas court, a trial judge may, with impunity and without the possibility of appellate review, adjudge an attorney or litigant to be in contempt because of malice, ill-temper or spite, or for any personal reason entirely apart from the case before him. Indeed, in the discussions with members of the Supreme Court of Texas which attended the proceedings herein, counsel for Petitioner inquired, in substance: "Is it the view of the Court that a trial judge could look at any attorney who was trying a case before him and say 'Mr. X, I do not like the color of your eyes. I find you to be in contempt of court, sentence you to three days imprisonment, and fine you $100.00 and costs"; and that if the trial judge had jurisdiction of the attorney's person—which he would have—and jurisdiction of the case on trial—which he presumably would have—that the Supreme Court of Texas would permit such a judgment to stand and would refuse to review the facts to determine if, as a matter of law, a contempt existed?" To this inquiry, the late Chief Justice of the Texas Supreme Court replied "That is an extreme case, but under our present views I think your question would be answered in the affirmative."

Such a situation is monstrous! The evils inherent in such a holding can find no better illustration than in the facts of the instant case. In the case at bar,

the Petitioner was stopped by the trial judge while he was arguing a case before a jury and was told to desist from making a certain argument. Petitioner attempted to obey the instruction and started to resume his argument. Again he was interrupted by the trial judge, and, when Petitioner attempted to inquire what, if anything, he was doing wrong, the trial judge made the following undignified and ungrammatical reply:

> "I will declare a mistrial if you mess with me two minutes and a half, and fine you besides." (R. 15, 26).

With this statement being made before the jury, Petitioner had both a duty and a privilege to except to the language and conduct of the trial court. Indeed, under rules of civil procedure in Texas, Petitioner could not have preserved this matter for appeal in the case on trial unless he duly and timely took such an exception. Consequently, Petitioner respectfully excepted to the above quoted statement by the trial judge. The moment he uttered his exception, he was adjudged in contempt of court. What clearer example could there be of an imposition of punishment, not for any affront or insult to the dignity of the court, but merely because counsel had the courage to attempt to fulfill his duty to his client by objecting to the highly prejudicial statement of the trial judge? Under the whole of the undisputed evidence in this case, can a situation be envisaged which more patently reflects punishment inflicted upon an innocent and inquiring attorney by a choleric and partisan judge?

If the dissenting opinion is correct in averring that the Supreme Court of Texas refused to examine the undisputed facts in this case to determine whether or not such facts constitute contempt as a matter of law, Petitioner faces imprisonment and the payment of a fine solely by virtue of a summary judgment rendered by a judge who was himself a party to the controversy. It is Petitioner's basic contention that he has been deprived of due process because he has been accorded no trial on the merits of his case. Although the question does not appear to have been presented to this Honorable Court, the Supreme Court of Illinois has ruled in *Union Drainage District* v. *Smith*, 233 Ill. 417, 84 N. E. 376, that a statute violates due process if it compels a litigant to submit his controversy to a tribunal of which his adversary is a member. Surely such a ruling is eminently sound and wholesome! In a landmark case, this Honorable Court ruled in *Tumey* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, that a litigant is denied due process if his liberty and property are subjected to the judgment of a judge who has a pecuniary interest in rendering an adverse judgment. Anger and vindictiveness on the part of a trial judge can lead as surely as pecuniary interest to an arbitrary and wrongful denial of justice and of due process! Hence, Petitioner submits that his "trial" in the district court was, within the standards of due process, no trial at all. With the Supreme Court of Texas refusing to examine the facts in issue or to exercise any powers of review with respect to the trial judge's action, Petitioner appears before this Honorable Court

convicted and sentenced, but untried. Petitioner seeks only to have some court review the facts upon which he has been convicted to ascertain if such facts possibly can support the judgment of conviction. If it be true that the Supreme Court of Texas refused to take such action, Petitioner prays that this Honorable Court accord him such a trial.

If, under the alternative interpretation of its opinion, the Supreme Court of Texas examined the facts alleged to constitute a contempt and held that such facts evidence a contempt, the denial of due process, and the need for review by this Honorable Court, remain apparent. Where an individual contends that he has been deprived by a state court of a fundamental right secured by the Federal Constitution, this Court has never hesitated to make an independent examination of the facts to ascertain if such a deprivation has occurred. Of the many decisions demonstrating this power on the part of this Honorable Court, the latest and perhaps the most apt is the recent decision in *Craig* v. *Harney*, 331 U.S. 367, 67 S. Ct. 1249, a decision which also involves action by a Texas Court. Once such an examination is made, can the Court say other than that Petitioner was punished solely for his action in excepting to the language and conduct of the trial court, and will the Court countenance such coercion of an attorney or such jeopardizing of the rights of his client? If there was any instruction given to Petitioner by the trial court, can Petitioner be deprived of his liberty and property for an alleged violation of such instruction without con-

travening the principle that "a person acting in good faith and with due respect to the court is not guilty of contempt if placed in a dilemma by an ambiguous order of the court"? See *N.L.R.B.* v. *Bell Oil & Gas Co., et al.*, 98 F(2d) 405. Can this Honorable Court review the record herein without observing as it did in *Cooke* v. *United States*, 267 U. S. 517, 45 S. Ct. 390, that "the case before us is one in which the issue bewteen the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows"? In the supporting brief attached hereto, Petitioner will cite additional authorities and will present arguments to the effect that questions such as these can only be answered in the negative.

Questions such as those stated above are most substantial. An answer to such questions will have effects far beyond the immediate effects upon Petitioner, for such an answer will profoundly affect every attorney and every litigant in the State of Texas and in every other jurisdiction in which there is danger of tyranny on the part of a trial judge. To the knowledge of Petitioner, this Honorable Court has never before been called upon to pass upon a situation precisely like the one at bar. However, the decisions of the Court in analogous situations afford strong reason for believing that Petitioner has been deprived of due process and is entitled to the relief which he seeks, while the zeal which this Honorable Court has shown in protecting an individual

from arbitrary or tyrannical action, be it judicial or otherwise, affords equally strong reason for believing that Petitioner will receive from this Court the relief which he seeks and to which, it is respectfully submitted, he is most certainly entitled.

Prayer

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued as provided by law to the Supreme Court of Texas, that the case be reviewed and determined by this Court, that the Petitioner have such relief in the premises as to this Court may seem just, and that the judgment of the Supreme Court of Texas be reversed by this Honorable Court.

Dated at Austin, Texas, April 19, 1948.

JOE J. FISHER
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Supporting Brief on Petition for Writ of Certiorari

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Preliminary Statement

The majority and dissenting opinions of the Supreme Court of Texas in this case (R. 33-52) are reported in 206 S.W. (2d) 1000. They have not yet been reported in the official reports of said Court.

Jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended; Title 28,

Section 344(b), U.S.C.A., upon the ground that the courts of Texas have denied to Petitioner due process of law and the rights and privileges embodied in the concept of due process, as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

Petitioner avers that the deprivation of due process by the courts of Texas which is involved herein presents a substantial question of the utmost importance because, quite apart from its effects upon him, it also affects most seriously the rights and privileges of every attorney and of every litigant in the State of Texas.

Petitioner has been imprisoned and fined by a district judge in Texas for certain words which he spoke while engaged in making a jury argument in a civil case then on trial (R. 14-15, 25-26). The suit on trial was a workmen's compensation case involving an injury to the left foot of a laborer. Under Texas law (Article 8306, Section 12, Revised Civil Statutes of Texas, 1925), the maximum recovery for a "specific injury" of this character is a recovery based upon a percentage of the average weekly wage for a period of one hundred twenty-five weeks. In the case under discussion, all parties had agreed that the average weekly wage of the injured laborer was $30.00 and that the compensation rate was $18.00.

In his argument, Petitioner first stated that the injury involved was a "specific injury". He then continued:

"The law states the amount of maximum compensation which a person can receive for such an injury, that is, one hundred and twenty-five weeks. That is the most compensation Anderson Godfrey could receive would be one hundred and twenty-five weeks, because his injury is confined to his left foot. That is all we are asking. Now, that means one hundred and twenty-five weeks times the average weekly compensation rate—"

At this point Petitioner was interrupted by Mr. Joyce Cox, one of the opposing counsel—the opposing counsel consisting of Mr. Cox, Mr. John G. Seaman, and the trial judge's son, Mr. T. Gilbert Adams—and the following discussion ensued:

"Mr. Cox: Your Honor please—

"The Court: Wait a minute.

"Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.

"The Court: That has all been agreed upon.

"Mr. Fisher: I think it is material, Your Honor, to tell the jury *what the average weekly compensation is* of this claimant so they can tell where he is.

"The Court: They are not interested *in dollars and cents.*

"Mr. Fisher: They are interested to this extent—

"The Court: Don't argue with me. Go ahead. I will give you your exception to it.

"Mr. Fisher: Note our exception."

"The Court: All right." (R. 14, 25)

At this point, Petitioner resumed his argument as follows:

"Mr. Fisher: This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, *at whatever compensation the rate will figure under the law.*

"Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.

"The Court: Gentlemen. Mr. Fisher, you know the rule and I have sustained his objection.

"Mr. Fisher: I am asking—

"The Court: Don't argue with me. Gentlemen; don't give any consideration to the statement of Mr. Fisher.

"Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury.

"The Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

"Mr. Fisher: That is all right. We take exception to the conduct of the Court." (R. 14-15, 26)

Upon the making of the latter statement by Petitioner, the trial judge held him in contempt of court, and, by successive judgments, increased his punishment to the maximum of three days imprisonment and a fine of $100.00.

The trial judge stated in his contempt judgment that Petitioner was in contempt for continuing in a jury argument after being instructed by the judge to desist from making such argument (R. 26-27).

As is stated in the Petition for Writ of Certiorari submitted herewith the Supreme Court of Texas either refused to review the above facts to ascertain whether, as a matter of law, such facts evidence a contempt, or it reviewed the facts and found that a contempt was evidenced (R. 33-52). In either event, Petitioner contends that he has been denied due process of law by the Courts of Texas.

POINTS OF ERROR

Point One

If the Supreme Court of Texas refused to review the facts herein to ascertain whether such facts, as a matter of law, constitute a contempt, Petitioner contends that said Court erred since such action denied to Petitioner any character of trial on the merits of his case, contrary to due process of law.

Point Two

If the Supreme Court of Texas reviewed the facts herein and held that such facts evidenced a contempt, said Court erred because:

(a) The facts conclusively show that Petitioner was adjudged in contempt

solely because he excepted to the conduct and language of the trial judge, and any punishment for such an act is violative of due process of law.

(b) The facts conclusively show that if any instruction was issued by the trial judge pertaining to the jury argument such instruction either was obeyed by Petitioner or was so vague and unintelligible as to be incapable of understanding or of obedience, and any punishment for an alleged violation of such instruction is violative of due process of law.

(c) The facts conclusively show that Petitioner was adjudged in contempt by a judge who had cast aside his role of an impartial arbiter and who had provoked the controversy involved and had become a party to such controversy, in violation of due process of law.

Argument and Authorities Under Point One

The dissenting judge in the Supreme Court of Texas—a judge who sat in on the deliberations of that Court and who presumably was in the best possible position to know the attitude of the majority of the Court in this case—interpreted the opinion of the Court as holding that:

> "the relator is not entitled to obtain any relief in this Court under habeas corpus proceedings, regardless of the lack of any probative evidence

in the record showing that he was guilty of any contempt." (R. 49)

The First Point of Error herein is predicated upon the assumption that such an interpretation of the holding of the Texas Court is correct.

Since the earliest days of our jurisprudence, it has been elementary that a court cannot "make contempt of that which is not contempt." *Church, Habeas Corpus*, sec. 152.

Such a principle necessarily presupposes the existence of some reviewing authority to ascertain whether or not the court which entered the contempt judgment attempted to make a contempt out of facts which did not constitute such a contempt. Under the view that the Texas Supreme Court refused to make such a review of the facts herein, a situation is presented in which Petitioner has so far been deprived of the opportunity to have any court say whether or not the facts in his case do constitute a contempt.

Moreover, the overwhelming weight of authority in this country is to the effect that a contempt judgment rendered summarily in direct contempt proceedings is absolutely void unless it recites therein, specifically and with particularity, the facts alleged to constitute such a contempt. Sec. 154 *A.L.R.* 1227. In at least one case, *Terminal R. Assn.* v. *United States*, 266 U.S. 17, 45 S. Ct. 5, 69 L. Ed. 150, this Honorable Court has set aside a contempt judgment

on the ground that the recitals contained therein were too vague and general to constitute a specification of facts amounting to contempt of court. The purpose of such a requirement obviously is to permit a scrutiny of the facts by a reviewing court for the purpose of ascertaining whether or not the facts constitute contempt. As is observed in the annotation in 154 *A.L.R.* 1227, as a summary of the decisions there cited and discussed:

> "The reason for the general rule that detailed facts must be set out in a judgment or order for direct contempt is that the courts, while recognizing the summary nature of direct contempt proceedings, try to limit to the absolute minimum the dangers inherent in such type of legal proceedings. Even a right to review in such cases constitutes no guaranty against unjust or arbitrary judgment if the reviewing court is not afforded an opportunity to evaluate the facts upon which the decision has been reached."

Similarly, with respect to the case at bar, it might well be observed that the right to review of a contempt judgment by habeas corpus—the sole remedy available in Texas in a situation such as this—affords no guaranty against an unjust or arbitrary judgment if the reviewing court, as seemingly did the Supreme Court of Texas, refuses to evaluate the facts upon which the judgment has been reached. This Honorable Court has always recognized that arbitrary action by a tribunal in the hearing of a cause or in its order violates due process. *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild*,

224 U.S. 510, 32 S. Ct. 535, 56 L. Ed. 863. Upon a parity of reasoning it would appear that the refusal of a court to ascertain whether or not unjust or arbitrary action has been taken would also amount to a deprivation of due process.

Two other well established principles deserve attention in this connection. In a host of decisions, this Court has announced that the right of appeal or review is not essential to due process, provided due process has already been accorded in the tribunal which rendered judgment. See, *inter alia*, *District of Columbia* v. *Clawans*, 300 U.S. 617, 57 St. Ct. 660, 81 L. Ed. 843; *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244. The presence of due process in the tribunal which renders the judgment is necessary to call this principle into operation. Contrariwise, this Court has held that due process does not require an opportunity for a hearing prior to entry of judgment, provided a route of appeal or review exists wherein a full hearing may be had. *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231; *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 53 S. Ct. 620, 77 L. Ed. 1265. The presence of a full and complete review of the law and the facts is necessary to call this principle into operation.

In the case at bar, Petitioner was summarily adjudged in contempt by the district judge without any opportunity for a hearing, or for an explanation, and, indeed, Petitioner was not even permitted

to inquire how or wherein the trial judge thought him to be in contempt. Such action would not appear to be sufficient to constitute the measure of due process which suffices to obviate the need for a right of appeal or review. Contrariwise, under the assumption upon which this First Point of Error is discussed, the Supreme Court of Texas has refused to review the facts upon which the contempt judgment is based. Such action would appear to be insufficient to call into play the principle that a judgment entered without due process may be cured if a full hearing is afforded by way of appeal or review.

If there existed herein a dispute as to the facts which actually occurred in the trial court, a reviewing court might well refuse to disturb the view which the trial court took in resolving the factual dispute. However, no such situation is presented here. In the instant situation there is no dispute about the facts which actually occurred in the district court, and, absent any such dispute, there cannot be invoked any principle to the effect that the reviewing court will not disturb the trial court's judgment on disputed facts. Thus, for example, if Petitioner were charged with having made a disrespectful gesture towards the trial court, or with uttering disrespectful language, and if Petitioner denied making the gesture or uttering the language, the trial court's finding on such matter might well be permitted to stand. In the present case, however, the facts are undisputed and they speak for themselves. The sole question—and the question

which the Supreme Court of Texas has answered in the affirmative—is whether the judgment of the trial court may be permitted to stand when the undisputed facts reveal a total lack of probative evidence to support such judgment.

As Petitioner has stated in his Petition for Writ of Certiorari submitted herewith, it does not appear that this Honorable Court has ever before been called upon to say whether the lack of review of the undisputed facts upon which a summary contempt judgment is based constitutes a deprivation of due process. While the question appears to be novel, the legal principles by which such a question should be answered are both ancient and elementary. Unless such lack of review is violative of due process, the maxim that "a court cannot make a contempt of that which is not a contempt" becomes a mockery, for any trial judge can so fabricate a contempt and can do it with impunity and without fear of review. Unless such lack of review is violative of due process, the requirement that the facts allegedly constituting a direct contempt be set forth specifically in the contempt judgment is an idle gesture, for an accused may be adjudged and held in contempt regardless of what such facts show. Unless such lack of review is violative of due process, a half-way trial in the court which entered the judgment and a half-way appellate review seemingly may be added together to produce the whole of due process, and the guarantees of the Fourteenth Amendment may thereby be stultified.

Argument and Authorities Under Point Two

If what the Supreme Court of Texas actually did in its treatment of this case was to examine the undisputed facts and hold that such facts evidence a contempt, Petitioner submits the three subdivisions of his Second Point of Error for consideration by this Honorable Court. In numerous decisions this Court has announced the principle which was thus stated in *Craig* v. *Harney*, 331 U. S. 367, 67 S. Ct. 1249:

> "In a case where it is asserted that a person has been deprived by a State court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made."

When such an examination is made with respect to the undisputed facts herein, Petitioner submits that his deprivation of due process is clearly revealed by reason of each of the three matters set forth and argued below:

Point (2a): According to the contempt judgment, Petitioner was adjudged in contempt because of his alleged action in persisting in a jury argument after being instructed to cease such argument (R. 26-27).

In fact, the record herein shows that the occurrence for which Petitioner actually was adjudged in contempt—the occurrence which touched the tinder to the trial judge's temper—was his action in

excepting to the judge's conduct in stating before the jury, "I will declare a mistrial if you mess with me two minutes and a half, and fine you besides."

If Petitioner actually persisted in an improper jury argument, he did so several statements prior to the time when he was adjudged in contempt. If this was his actual offense, strange indeed is the fact that he was not held in contempt at the time of its commission. Stranger still, and far more indicative, is the fact that the contempt judgment occurred only when he took an exception to the conduct of the trial judge—an action which was necessary to preserve the matter for appeal. Apt indeed is the admonition, universally recognized, to the effect that "the power to punish for contempt should be exercised with great caution, and not as a vindictive measure." *Herring* v. *Houston Nat'l Exchange Bank*, 113 Tex. 337, 255 S.W. 1097.

If it be true that Petitioner was punished because he excepted to the conduct of the trial court, is punishment of such character violative of due process? Again, Petitioner confesses that he knows of no instance in which this or any court has been called upon to answer such a question. In *Ex parte Crenshaw*, 259 S.W. 587, 31 A.L.R. 1131, the Texas Court of Criminal Appeals—the court of last resort in criminal matters in that jurisdiction—vigorously condemned the action of a trial judge in punishing an attorney for contempt because the attorney was attempting to except to a remark by the judge in the presence of the jury, but the court did not dis-

cuss the question of due process. While the effect of the element of due process in a case of this character presents a question of first impression, such question would appear to be deserving of only one answer.

At the very foundation of any concept of due process is the right to a full and impartial trial for the redress of all injuries. In Texas, as in all other jurisdictions, a judgment in favor of one party will be set aside if it appears that the trial judge in the presence of the jury made remarks which were prejudicial to the losing party. *Southland Greyhound Lines, Inc.*, v. *Matthews*, 74 S. W. (2d) 713. Likewise, as is shown by the case last cited, an exception to such remarks must be taken if they are to be assigned as error upon an appeal.

It can scarcely be thought that due process would be present if a trial judge denied to one party the right to except to his remarks, while permitting such exceptions by the other party. Likewise, it can scarcely be thought that due process is present when a trial judge is permitted to penalize counsel for taking such an exception by adjudging him in contempt or to coerce him in like manner into refraining from taking future exceptions. Consequently, Petitioner respectfully submits that he was held in contempt solely because he excepted to the conduct of the trial judge, that he possessed both a duty and a privilege to take such exception, and that the judgment of the trial court constituted an unconstitutional impediment in the way of the performance

of his duty and an equally unconstitutional infringement of the exercise of his privilege.

Point 2(b): Although the facts in this case clearly reveal that Petitioner was adjudged in contempt for his action in excepting to the conduct of the district judge, rather than for any action in disobeying an order or instruction of such judge, let us, for purposes of argument, see if there is any possible way by which Petitioner could be held guilty of disobeying any order or instruction of the trial judge without violating due process.

It is elementary that an order or instruction is incapable of obedience if it is vague or unintelligible. Moreover, as the Circuit Court of the Fifth Circuit observed in *N.L.R.B.* v. *Bell Oil & Gas Co.*, 98 F(2d) 406:

> "If placed in a dilemma by an ambiguous order, one who acts in good faith and with due respect to the court is not guilty of contempt."

The present inquiry is made clear by an item by item examination of the facts herein (R. 14-15, 25-26). The incident involved in this case started when Petitioner began to tell the jury that the injured negro would recover compensation at the rate of the "average weekly compensation rate" for a period of one hundred twenty-five weeks. At this point, Petitioner was about to tell the jury that the agreed compensation rate was $18.00 per week—information which would have enabled the jury to make the mathematical computation of 125 times $18.00 and

thereby to obtain the dollars and cents figure of the maximum recovery.

Petitioner was interrupted by opposing counsel prior to giving the dollars and cents figure of the compensation rate, and the trial judge observed:

"That has all been agreed upon."

The only thing which had been agreed upon was the fact that the negro's compensation rate was $18.00. Hence, the judge's remark could only have been referable to a statement of the actual amount of the rate.

Following this, Petitioner said:

> "I think it is material, Your Honor, to tell the jury *what the average weekly compensation is* of this claimant so they can tell where he is."

Here again, the conversation referred only to a statement of the $18.00 rate—the actual dollars and cents figure. This is confirmed by the fact that the trial judge immediately responded:

"They are not interested in dollars and cents."

At this point the entire conversation had been with respect to Petitioner's prospective statement to the jury that the rate for the injured negro was $18.00. If there was any instruction given by the trial judge, it was an instruction not to tell the jury that the rate was $18.00—that "they are not interested

in dollars and cents." If there was any implication which could be drawn from the trial judge's remarks, it was an implication which forbade the giving of any information whereby the jury could, by a mathematical computation, ascertain the actual dollars and cents figure of the maximum recovery.

Petitioner took an exception to the trial judge's ruling on this point and continued his argument as follows:

> "This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, *at whatever compensation the rate will figure under the law.*"

If there was any violation of any order or instruction by the trial court pertaining to the jury agreement, it occurred when counsel made this statement. Yet of what did the statement consist? Petitioner desisted from giving the jury the dollars and cents figure of the compensation rate, or from giving them any information whereby a mathematical computation would have revealed the dollars and cents figure of the maximum recovery. In lieu thereof, Petitioner substituted the harmless statement that recovery would be "at whatever compensation the rate will figure under the law". In so doing, he thought he was complying with the instruction and desires of the trial court. When the trial judge also objected to this statement, Petitioner for the first time realized that perhaps the trial judge had instructed him to do something other than to refrain

from giving the dollars and cents figure of the rate, and Petitioner started to inquire just what the trial judge did mean. Thus, Petitioner said:

"I am asking—"

Again he was interrupted by the trial judge, with the judge saying:

> "Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher.

If the trial judge actually meant to instruct Petitioner not to make any argument at all concerning the computation of the amount which the negro might recover, his language was at the very least most ambiguous in this respect. Certainly the most reasonable construction to be placed upon such language was to interpret it, as did Petitioner, as only forbiding a statement of the dollars and cents figure of the compensation rate. Certainly, also, Petitioner was placed in a most vexing dilemma by the judge's instruction. When it appeared that the judge might have meant something by his language which was not apparent from the words spoken by him, Petitioner attempted to inquire just what the judge meant, and was prevented from so doing. What could Petitioner reasonably have done other than that which he did? He obeyed the order as he understood it—and, it is submitted, as any reasonable person would have understood it—and, when it became apparent that he must have misunderstood

the scope of the order, he attempted to inquire what was meant and was prevented by the trial judge from so doing.

Everything about the dialogue between Petitioner and the trial judge reveals that Petitioner acted in good faith and with due respect when he resumed his jury argument. If in any way he disobeyed such order, he did so only because the order was absolutely ambiguous with respect to the meaning which the trial judge apparently intended it to convey.

Again, from the standpoint of a deprivation of due process, specific authorities on this question appear to be lacking. In *Terminal R. Assn. of St. Louis* v. *U.S.*, 266 U.S. 17, 45 S. Ct. 5, 69 L. Ed. 150, this Honorable Court held that a decree or order will not be expanded by implication in contempt proceedings, beyond the meaning of its terms when read in light of the issues and the purpose for which the suit was brought, and that the facts found must constitute a plain violation of the decree or order so read. Likewise, the decisions of numerous state courts, as summarized in 17 *C.J.S.* p. 16, are to the effect that:

> "a party cannot be punished for failure to obey an order which is contradictory, or for failing to do something not specified in the order, or for doing something not forbidden by the order, nor should a party be punished for disobedience of an order which is capable of a construction consistent with innocence."

Although the decisions announcing the above principles do not specifically allude to due process, considerations of due process necessarily must underly the statement of such principles. Can it be said that it would be due process to expand the instruction of a trial judge beyond its ordinary meaning and then to punish an individual for disobeying the order as so expanded? Can it be said that it would be due process to punish an individual for disobeying an instruction which is so ambiguous that it cannot reasonably be understood to forbid the act which he performed? Can it be said that it would be due process to punish for violating an instruction when the instruction did not forbid the action which he took or the words which he uttered? The answers to these questions are obvious, and such answers point squarely to the need for a holding herein to the effect that any punishment inflicted upon Petitioner for disobeying any instruction of the trial court likewise is violative of due process.

Point 2(c): From the undisputed facts in this case, it is apparent that the trial judge provoked and participated in the controversy involved in a manner which was scarcely in keeping with the rendition of impartial justice. Throughout the dialogue between Petitioner and the trial judge there appears no statement or act which could be deemed in any way unseemly until the point when Petitioner attempted to inquire just what the trial judge meant by his ruling and was prevented from so doing by the trial judge's statement:

> "Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher."

Immediately thereafter, and prior to the time that there could possibly have been any objectionable statement made by Petitioner, the trial judge added:

> "I will declare a mistrial if you mess with me two minutes and a half, and fine you besides."

One can only speculate as to the reasons for the ill-temper and the obviously biased attitude of the judge in this case. Petitioner's client was a negro —perhaps that was the reason. Perhaps the fact that one of the opposing counsel was the trial judge's son was also a not negligible factor, for it was this same combination of father on the bench and son before the bar that not so long before had been censured by the Supreme Court of Texas in *Postal Mutual Indemnity Co.* v. *Ellis*, 169 S.W.(2d) 482. However, regardless of the reasons for the attitude of the trial judge, prejudice on his part plainly was present and was evidenced in his every word.

In the usual contempt situation—that of a constructive contempt—the judge has only a detached and impersonal interest in the injunction which he has issued, and can determine impartially whether or not such injunction has been disobeyed. Far different is a controversy which involves a fancied slight to the feelings of the judge or a controversy in which the judge has become one of the disputants.

An elementary requirement of due process is that a tribunal which renders a particular judgment must be an impartial one. *Buck* v. *Bell*, 143 Va. 310, 130 S.E. 516, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 100. A statute requiring an individual to submit his case to a tribunal of which his adversary is a member has been held not to afford due process of law. *Union Drainage Dist.* v. *Smith*, 233 Ill. 417, 84 N.E. 376. This Honorable Court has held unconstitutional any situation in which the property or liberty of an individual are subjected to the judgment of a court in which the judge has a direct and substantial pecuniary interest in the judgment. *Tumey* v. *Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749. Just as pecuniary interest in a judgment may prove a compelling force for the rendition of an inequitable or biased judgment, so also, it is respectfully submitted, may anger or vindictiveness prove an equally compelling force.

In this connection, the decision by this Honorable Court in *Cooke* v. *United States*, 267 U.S. 517, 45 S. Ct. 390, is highly pertinent. The *Cooke* case differs from the case at bar in that it was a constructive contempt situation in which due process was found lacking because the accused was not afforded a proper opportunity to prepare his defense, secure counsel and call witnesses, etc. However, the *Cooke* case is similar to the instant case in another respect for there, as here, the facts reveal a trial judge whose personal feelings were injured, a trial judge who entered into the dispute, a trial judge who repeatedly refused to permit the alleged contemnor

to inquire into the nature of his alleged offense or to make the most simple of statements or explanations. In reversing the contempt judgment, this Court stated:

> "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward, and injure the authority of the court by too great leniency. . . .
>
> "The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."

Similarly, the case at bar is one in which the record abundantly reveals marked personal feeling on the part of the judge and a total absence of any impartial or calm judicial consideration and conclusion.

Conclusion

Even though the penalties which have been in-

flicted upon this Petitioner are relatively light, a judgment of contempt is far from being a trivial matter. In the case of an attorney, such judgment may well be tragic, for the judgment may inflict irreparable injury upon his practice, or may, at the very least, lead to extreme embarrassment and to a loss of respect in the community in which he resides. If a contempt has in fact been committed, these are the inevitable concomitants of the offense, but where no contempt has been committed, severe and unfair indeed are these consequences of a contempt judgment.

It is unthinkable that there can be no remedy or relief for such a situation—that an unfair or ill-tempered judge may safely and without review by an appellate court pronounce a judgment of contempt upon any state of facts so long as he is careful to enter a proper order and commitment. It is also unthinkable that a trial judge should be permitted to fabricate a contempt by labelling certain acts as such when the undisputed facts evidence the absence of any contempt. Petitioner cannot believe that this is the law, or that such procedure constitutes due process of law. Neither can Petitioner believe that this Honorable Court will sanction such action.

Petitioner knows that this Honorable Court will carefully review this case, as it does all other cases, but in view of the extreme gravity of a situation of this character, Petitioner respectfully urges that the Court give especial attention to the principles

which it enunciates herein, to the end that an attorney may know that he may safely represent his clients in a respectful manner and within the bounds of proper trial procedure without the risk of an unwarranted and unreviewable judgment of contempt, and to the further end that attorneys and all others may know that the revered principle of upholding the dignity of the courts may not be used as a cloak to conceal venom or personal spite.

WHEREFORE, Petitioner prays as in his Petition for Writ of Certiorari.

Respectfully submitted,

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